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No. 94-1675

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CITY OF UPPER ARLINGTON, *et al.*,

Petitioners,

v.

JAMES VITTITOW, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED BY PETITIONERS

Whether regulation of picketing that creates a captive audience in the home is restricted by the First Amendment solely to picketing that occurs directly in front of a particular residence?

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I. INTRODUCTION

Plaintiffs James Vittitow, Marisa Vittitow, Ken Hunley, Stephanie Hunley, Rick Knapshaefer, Carolyn Knapshaefer, Zoe Vankleek, Bob Skovgard, Vivian Skovgard, Paula Baker, Patty Hott, Mike Nestor, Allyse Kerns, Dorcey Stidham, Anita Stidham, and Richard W. Ulbrich (collectively "Respondents") hereby submit their Brief In

Opposition to the Petition for a Writ of Certiorari ("Petition") filed on or about April 11, 1995 by Defendants City of Upper Arlington, City Attorney Sharon H. Pfancoff, City Chief of Police Thomas J. Kulp, and City Manager Richard A. King (collectively "Petitioners").

Respondents received service of the Petition on April 12, 1995.

II. STATEMENT OF THE CASE

A. Procedural History

For purposes of this Brief In Opposition, Respondents concur with the procedural history set forth in the Petitioners' Statement of the Case.

B. Statement of Facts

The factual record in this case consists of some documentary evidence, a videotape of Respondents' picketing and discussions with city police on October 3, 1992, and the testimony of four witnesses[1] at the November 6, 1992 TRO/Preliminary Injunction hearing (hereinafter "TRO hearing"). Based upon that evidence, Respondents hereby modify and supplement Petitioners' statement of the facts as follows:

1. The City of Upper Arlington ("City") ordinance which was enforced against the Respondents prior to the filing of this action states: "No person shall engage in picketing before or about the residence or dwelling of any individual in this City." Prior to the issuance of the

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[1] The witnesses at the TRO hearing were Respondent James Vittitow and three officials for the City of Upper Arlington: city attorney Sharon Pfancuff, city detective Glen Willer and city police Sergeant Dwight Holcomb.

injunction by the District Court, the City had promulgated no standards or guidelines for enforcement of the Ordinance.

2. As early as April 1992, Respondent James Vittitow was familiar with *Frisby v. Schultz* and visited (with Respondents) the City of Upper Arlington to picket in the residential neighborhood[2] of an abortionist named Dr. Robinson. However, city police interferred even when Respondents walked a route covering a number of residences. Respondents were instructed by city police that they were simply "not allowed in this neighborhood."

3. Desiring to return to the City of Upper Arlington in October, 1993, and to picket without police interference, Respondents sought guidance by having their counsel correspond twice with City authorities,[3] wherein specific mention was made of *Frisby v. Schultz* and to the City's lack of discernible guidelines. The City's response was limited to the assertions that it would "enforce the existing ordinance to the fullest, as called for by the Police Division procedures and prosecuted accordingly by the City Attorney's office," and that it was the City's policy "to abide in full by the United States Constitution in enforcing our laws."

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[2] Respondents take issue with the assertion (Petition at p. 5) that Respondents picketed "the doctor's *residence*." The record in this case establishes very clearly that Respondents, by their actions and stated purposes, were picketing the doctor's *neighborhood*. This is a common semantical game played in post-*Frisby* residential picketing cases, but the distinction is significant.

[3] There are four letters in this record as stipulated exhibits to the TRO hearing: two from Respondents' counsel to City authorities, and two responses back to counsel from City authorities.

4. Assuming from the City's responses that they would be permitted to picket in accordance with *Frisby vs. Schultz*, Respondents travelled to Dr. Robinson's neighborhood on October 3, 1992 with a plan to cover a larger picketing route than during any previous visits. Respondents got out of their cars on Roseberry Drive and started walking up and down both sides of Benderton Court (Dr. Robinson's cul-de-sac, approximately 465 feet in length) and back onto Roseberry Drive, before going back down the cul-de-sac where Robinson lived. Respondents were silent and kept moving at all times. On the second time around the cul-de-sac, they were confronted by Upper Arlington police.

5. James Vittitow testified as to the Respondents' two-fold purpose in residential picketing:

> Q. And what is your purpose for residential picketing in Upper Arlington?
>
> A. Okay. We want to inform the community that—that by our presence there, that abortion is wrong. And, also, that in their community—that there is a man who makes his living taking the lives of preborn children.

6. Respondents' conduct and the City's enforcement standards (or lack thereof) were captured on videotape (Trial Exhibit H), which recorded the discussion between Vittitow and Sgt. Holcomb:

> Vittitow: How can we target his house when [inaudible] and we are following what the Supreme Court says as far as you don't stand in front of somebody's house but you can picket a neighborhood. We've been on this street, we've been on the other street, we've gone all the way down to the corner—like we're taking in a whole area. So we've been here for

about twenty minutes and we've only gone in front of his house once.

Holcomb: Okay.

Vittitow: I don't believe that is really focusing on anybody's house.

Holcomb: But I do need to advise you that we could feel that we have probable cause that you would be in violation of an Upper Arlington law. At this point, we would be asking that you cease your operations right here in this area. And we do ask you that you cease your operations at this time.

Vittitow: Okay. You don't want us to walk on this street. Can we walk on another street?

Holcomb: I want you to cease the operation picketing here for Dr. Robinson. As you well—as you said, the Supreme Court, you know what the ruling is—

Vittitow: Right. That we are allowed to picket a residential neighborhood and that the contents of signs are irrelevant, according to what the Supreme Court said.

Holcomb: That depends upon where you're targeting a particular area. But you could be in violation of an Upper Arlington law. And at this time, I have probable cause in watching you people walking by Dr. Robinson's house to believe that your group is in violation of that.

Vittitow: Okay. Even though they're walking in front of many other people's homes too?

Holcomb: At this particular time, I'm feeling that you would be in violation based upon the probable cause I have at this time that you would be targeting this particular home.

Vittitow: Okay. And what happens if we continue walking through the neighborhood and don't come back to this home?

Holcomb: You head on down the neighborhood, we'll address that here shortly. At this time I feel I have probable cause to believe that you are in violation of our law.

Vittitow: And will that result in our arrest, or are you saying you are going to talk to your superiors and then come back?

Holcomb: At this time I am asking that you cease and head on. We'll give you an opportune time to get back to your vehicles and everything, but what would happen, we would issue you a citation and a summons [inaudible] court.

Vittitow: Okay, so if we don't stop doing what we are doing right now, we're going to be either cited or arrested?

Holcomb: Most likely, just cited. At this time, we'll just issue citations to you if you continue.

* * * *

Vittitow: Now, you've witnessed us walking these other places too and you still think that is focusing on this one particular residence?

Holcomb: That would be correct. I feel at this point that anything back in this area for Benderton Court, for Dr. Robinson and the address that you have is focusing at this particular time on his home.

Vittitow: Even though we are covering many houses on this short street.

Holcomb: I have probable cause to believe that you're in violation of the law.

Vittitow: Okay. Alright. Well, we will leave and we leave in protest 'cause we don't feel we are violat-

> ing—we believe that we are within the guidelines of what the Supreme Court said as far as like, you do not focus on one house. . . .

7. At the TRO hearing, Sergeant Holcomb identified his "probable cause" factors as (a) a previous history of residential picketing at Dr. Robinson's home; (b) a recording from a telephone hotline in Dayon, Ohio stating that protestors would be going to Robinson's home on October 3; and (c) the fact that Dr. Robinson's name appeared on some of the picket signs; (d) Sgt. Holcomb's perception that when he arrived at the scene the protestors were all on the cul de sac and within a space of about 250 feet. Based upon these factors, Sergeant Holcomb concluded that he had probable cause that the protestors were "targeting" Robinson's home.

8. Upon cross examination, Sergeant Holcomb admitted that there was no evidence that Plaintiffs had done anything other than walk up and down the public sidewalks. He also admitted that he did not know who was responsible for the telephone hotline in Dayton, Ohio. Vittitow, on the other hand, expressly denied any responsibility for the message on the hotline.

9. Respondents take issue with Petitioners statement that after Respondents were ordered to abandon the cul-de-sac, they "were permitted to march through adjoining neighborhoods." (Petition at p. 5) Although they did do so briefly, they did so with uncertainty and at their own risk. Upon specific inquiry by Vittitow about picketing on other streets, Sgt. Holcomb would only say: "I will have to address that if you continue the operation down there." Consequently, Respondents were sufficiently chilled that they did not stay around to picket as long as they had planned. James Vittitow at the TRO hearing:

> Q. . . . Did you Picket as long as you wanted to that day?
>
> A. No.
>
> Q. Or as long as you had planned?
>
> A. Not really.
>
> Q. And why did you stop before you–before you planned?
>
> A. Well, even though we did go down the other streets without incidents, we were still uncertain about what our rights–what they were going to allow us to do. I felt increasingly uncomforable, and said, well, let's just go ahead and leave now.

10. Finally, Respondents respectfully suggest that other "findings" of the District Court are better characterized as assumptions, because there was no evidence to support them. For example, there was no testimony from the doctor or his family, and no evidence of any "harm" suffered by them. Therefore, when the District Court concluded that "[t]he doctor and his family were, in effect, trapped, unwilling recipients of plaintiffs' speech" (see Petition at Appendix B-11) it was speculating and generalizing in the absence of any evidentiary basis.

III. ARGUMENT: REASONS FOR DENYING THE WRIT

There are two reasons for denying the writ, both of which stem from the reality that this case has little to do with the constitutional arguments now being posed by the Petitioners.

First, the conduct of the Petitioners in this case was directly contrary to *Frisby v. Schultz*, 487 U.S. 474, 101 L.Ed.2d 420, 108 S.Ct. 2495 (1988), and did not raise

the question posed in the Petition. The City of Upper Arlington had no regulation(s) or guideline(s) in place during the events relevant to this case. Interestingly enough, *Frisby* all but invited municipalities to impose "reasonable time, place and manner restrictions" appropriately tailored to the "residential character" of streets, 487 U.S. at 481, but the City of Upper Arlington made no such effort. Having deliberately disregarded *Frisby* after Respondents raised the issue and attempted to ascertain the City's enforcement policy, Petitioners have proceeded to retain learned legal counsel to pose interesting hypothetical questions of this Court. Had Petitioners really wanted review of the constitutional parameters of the "Regulation of [Residential] Picketing" (Petition at page i), a good starting place would have been the establishment of a regulation in the first place. Quite to the contrary, Petitioners vested themselves with breath-taking (i.e., standardless) discretion which was so undefined that City officials were unable (or unwilling) to explain permissible picketing standards to citizens actively seeking guidance. Having been enjoined from such clearly unconstitutional and chilling conduct, Petitioners now want this Court to entertain hypothetical questions based upon regulations never adopted.

The second reason for denying the writ is that the conduct of the Respondents in this case was perfectly consistent with *Frisby* and does not require answers to the question posed in the Petition. In spite of the District Court's conclusion that Respondents' activities constituted "the functional equivalent" of a "siege" of the doctor's house (Petition at pp. 5, 12), the undisputed facts acknowledged by the District Court are that Respondents were quiet, used no sound amplification devices, and moved continuously. (See District Court's

Opinion and Modified Injunction: Petition at Appendix B-13, n.4). If this does not comply with *Frisby's* approval of "[g]eneral marching through residential neighborhoods [and] walking a route in front of an entire block of houses," 487 U.S. at 483, then *Frisby* is no longer good law.

The reality is that the conduct of Respondents in this case was significantly different from some types of impermissible conduct discussed in *Frisby*, where a large group of protestors gathered on the doctor's doorstep, 487 U.S. at 487. The conduct of Respondents was also different from the protests found in other cases cited in the Petition, cases wherein civil injunctions were issued, usually in the absence of any ordinance, against individual or groups found to have engaged in harassment or other wrongdoing. As the Sixth Circuit noted below, in such cases "the trial judge rightfully undertakes to define the rights of the parties in an appropriately worded injunction, if an injunction is called for." *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1107. One such case was *Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed. 2d 593 (1994).

Because Respondents were picketing under a generally applicable ordinance, had engaged in no wrongdoing, sought to disseminate a message to the general public as well as to the individual doctor, and did not picket "solely in front of a particular residence," 487 U.S. at 483, most of the authority offered by Petitioners simply is not helpful here.

Finally, Respondents respectfully suggest that the only reason for this Court to grant the writ is to substantially modify the *Frisby* holding. Contrary to the best efforts of some litigants, municipalities and lower

court judges, there is really very little to be confused about in the aftermath of *Frisby*. Petitioners may not like *Frisby*, but the Sixth Circuit was correct when it stated below that *Frisby* "could not be more clear: '[O]nly focused picketing taking place solely in front of a particular residence is prohibited.'" *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1107 (6th Cir. 1995).

Should the Court deem this case to be appropriate for review of the residential picketing issue, Respondents will look forward to posing some questions of their own:

1) On what basis does one "invade the home" by walking silently down the public sidewalk?

2) How can there be "unwilling listeners" to silent picketing?

3) Why is the resident who is the subject of the picket entitled to more protection than his neighbors?

4) If "bubble zones" may be enforced, as the District Court suggested, under generally applicable, content-neutral ordinances, who is to decide which citizens may enter the zones and which citizens may be banned from the zones?

5) How many residences can a single, solitary picket "put under siege" at the same time?

This exercise can go on forever, but Respondents suggest that it is best reserved for cases where the facts actually present such issues.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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